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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 MICHAEL ANTHONY ABELS,

12 Plaintiff,

13 v.

14 HAROLD CLARKE, *et al.*,

15 Defendants.

Case No. C07-5303 RBL/KLS

ORDER DENYING PLAINTIFF'S
MOTION TO DEPOSE AND
DEFENDANTS' MOTION TO
QUASH

16 Before the Court are Plaintiff's Motion to Depose Defendants (Dkt. # 95) and Defendants'
17 Motion to Quash (Dkt. # 99). For the reasons set forth below, both motions shall be denied.

18 **II. DISCUSSION**

19 **A. Plaintiff's Motion to Compel Depositions**

20 Plaintiff seeks an order compelling the depositions of Defendants but he has not conferred
21 with defense counsel nor has he given notice identifying the time and place of the depositions.
22 Plaintiff is referred to Rule 30 of the Federal Rules of Civil Procedure governing the proper
23 procedure to follow regarding notice and the taking of depositions. Plaintiff is advised that he must
24 confer with Defendants' counsel and that the Court will not entertain any discovery motions unless
25 the parties have first attempted to resolve their discovery disputes. Any discovery motion brought
26 before this Court "must include a certification that the movant has in good faith conferred or
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1 attempted to confer with the person or party failing to make the discovery in an effort to secure the
2 information or material without court intervention.” Fed. R. Civ. P. 37(a)(2)(B).

3 However, it appears from Plaintiff’s motion and Defendants’ response that the parties are
4 aware that Plaintiff seeks to take the non-stenographic depositions of the Defendants; the parties
5 simply need to agree on the date and the details for conducting the depositions. To the extent the
6 parties cannot agree, the Court suggests the following:

7 (a) any deposition performed by plaintiff shall take place at or near the
8 McNeil Island Corrections Center (MICC), organized with the assistance of the
authorities at the MICC;

9 (b) if the parties cannot agree otherwise, the depositions shall be conducted
10 before an officer appointed or designated under FRCP 28; this should be an
11 independent party without any interest in the matter and defendants should in good
12 faith seek to allow or agree to use an employee of the Department of Corrections to
perform these duties to alleviate the high cost of using a private business; in any
event the taped deposition shall include the information indicated in FRCP30(b)(4);

13 (c) the individual either chosen by the parties or appointed by the court to
14 provide the oath at a deposition shall also operate two tape recorders to produce two
15 original recordings of a deposition; (Please note, if the parties are unable to agree to
16 an individual, before the court is willing to appoint an individual to administer oral
17 depositions for plaintiff, plaintiff must explore other means to conduct discovery.
Specifically, plaintiff should consider Rule 31 to obtain information. The parties
shall also note Rule 29 of the Federal Rules of Civil Procedure provides alternatives
to general discovery practice and procedure, and the court encourages the parties to
mutually work out discovery complications. Parties should inform the court of
stipulations made pursuant to Federal Rule of Civil Procedure 29.)

18 (d) defendants’ counsel may attend any deposition noted by plaintiff and
19 defendant may record a deposition on his or her own equipment or defendants may
20 ask plaintiff to produce a copy of the original tape at defendants’ cost; defendants
may choose to stenographically record a deposition at their own cost;

21 (e) at the end of a deposition the plastic tab(s) on each original cassette shall
be removed to help prevent the tape from being erased or recorded on a second time;

22 (f) at the end of a deposition one original tape shall be placed in an envelope,
23 sealed, and signed by the person chosen or appointed to give the oath; this tape
recording shall be delivered in its sealed state to the clerk of the court for filing with
24 the court record;

25 (g) if the testimony from any deposition is to be used by either party in a
26 motion, pleading or any aspect of the trial, the party proposing to use that testimony
must supply the court with a written transcript of the relevant portions of the
deposition;

27 (h) a transcript of a deposition shall not be filed with the court unless it is to

1 be used by a party in a motion, pleading, or trial of this matter; a transcript of a
2 deposition, in whole or in part, shall not be filed with the court unless the deponent
3 has had the opportunity to review and make any changes or corrections he or she
4 deems necessary;

5 (i) any challenge to the accuracy or trustworthiness of a transcript filed by a
6 party can be raised in an objection served and filed by the opposing party in a
7 responsive brief or appropriate and timely motion;

8 (j) if the recording is of poor quality and the court cannot understand the tape
9 and transcription, the recorded deposition shall not be utilized by either party for any
10 purpose.

11 Accordingly, Plaintiff's motion to compel (Dkt. # 95) shall be denied and the parties are
12 directed to confer to schedule the depositions of Defendants. The parties are advised that "[a] good
13 faith effort to confer with a party or person not making a disclosure or discovery requires a face-to-
14 face meeting or a telephonic conference." Local Rule CR 37(a)(2)(A). The court expects Plaintiff
15 and defense counsel to cooperate in their discovery efforts.

16 **B. Defendants' Motion to Quash Deposition of Mr. Clarke**

17 As a general matter, agency heads and top government officials are not subject to
18 deposition.

19 *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979). In addition, "[c]ourts cannot,
20 and should not, undertake a probe of the mental processes utilized by an administrative officer in
21 performing his function of decision." *Ledgering v. State*, 63 Wn.2d 94, 101, 385 P.2d 522 (1963)
22 (citing *United States v. Morgan*, 313 U.S. 409, 61 S. Ct. 999, 85 L. Ed. 1429 (1941)).

23 Defendants argue that Mr. Abels' transfer to another facility is not central to this case and
24 therefore, Mr. Abels' desire to depose Mr. Clarke concerning his reasons for the transfer are not
25 relevant to this proceeding. Defendants are incorrect. The only issue remaining in this case is
26 whether Defendants' transfer of Plaintiff from the Lincoln Park work release to prison was
27 retaliatory. (Dkt. # 81, pp. 1-2).

28 Plaintiff is advised, however, that he should refrain from questioning Mr. Clarke as to his
deliberative processes in supervising staff or instituting policy directives.

Accordingly, it is **ORDERED**:

ORDER 3

- 1 (1) Plaintiff's Motion to Depose Defendants (Dkt. # 95) is **DENIED**;
2 (2) Defendants' motion to quash deposition of Defendant Clarke (Dkt. # 99) is
3 **DENIED**; and
4 (3) The Clerk of the Court shall send a copy of this Order to Plaintiff and to counsel for
5 Defendants.
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7 DATED this 6th day of August, 2008.
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11 Karen L. Strombom
12 United States Magistrate Judge
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